United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

W/ affidavit

74-1753

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1753

DEORAJ SINGH,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

PAUL J. CURRAN,
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Attorney for Respondent.

MARY P. MAGUIRE,
LYDIA E. MORGAN,
Special Assistant United States Attorneys
Of Counsel.

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Deoraj Singh petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on April 12, 1974. That order dismissed the petitioner's appeal from an order of an Immigration Judge finding him deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as a nonimmigrant who had remained longer than authorized. The basis for his decision was that Singh had entered the United States on December 19, 1971 as a nonimmigrant visitor for pleasure authorized to remain in the United States until March 1, 1972 and had remained in the United States beyond that date without authority.

The petitioner concedes that he is deportable as an overstay visitor but contends that the Board's order should be set aside because the deportation proceedings were initiated by an illegal arrest, search and seizure.

Issues Presented

1. Whether petitioner's warrantless arrest by an immigration officer was barred by the requirement of Section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(2), that there be a reasonable ground for believing that the alien might escape prior to the issuance of a warrant.

2. Whether, assuming petitioner's arrest to have been in violation of his Fourth Amendment rights and contrary to the provisions of 8 U.S.C. § 1357(a)(2), such an arrest vitiates an otherwise valid order of the Board of Immigration Appeals requiring petitioner, a concededly deportable alien, to depart from the United States.

Statement of the Facts

The petitioner is a 25 year old married alien, a native and citizen of Guyana. He was admitted to the United States as a nonimmigrant visitor for pleasure on December 19, 1971 and was authorized to remain in this country in that status until March 1, 1972. He failed to depart by that date, remained in the United States without authority, and accepted employment in violation of his nonimmigrant status.[1]

On July 11, 1973 immigration officers conducted a routine field investigation at the garage in Brooklyn where the petitioner was employed. The immigration officers questioned one of the petitioner's co-workers who was found to be an alien illegally in the United States and who was thereupon arrested.

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[1] Non-immigrant aliens admitted for pleasure are not permitted to accept employment in the United States. 8 C.F.R. § 214.1(c); *Londono* v. *Immigration and Naturalization Service*, 433 F.2d 635 (2d Cir. 1970).

The officers then questioned the petitioner who told them that he was from Guyana, that he had no identification and that he wished to consult his attorney (T. 8, p. 4).* One of the officers handcuffed the petitioner and he was taken to the New York District office of the Immigration and Naturalization Service (the "Service") in Manhattan. At the Service office the petitioner apparently voluntarily complied with a request that he place his wallet on a desk but he was not questioned until his attorney had arrived at the Service office (T. 8, p. 8). Nothing contained in petitioner's wallet was relied upon by the Service to sustain petitioner's deportability. The petitioner's attorney voluntarily turned over the petitioner's passport to the Service (T. 8, p. 9).

The Service instituted deportation proceedings against the petitioner on June 11, 1973 by the issuance of an order to show cause and notice of hearing (T. 9). At the deportation hearing on September 14, 1973, the petitioner, through his attorney, conceded the factual allegations in the order to show cause, *i.e.*, that he had been admitted to the United States as a nonimmigrant visitor for pleasure until March 1, 1973 and had remained in the United States beyond that date without authority (T. 8, p. 1). The petitioner contended, however, that the deportation proceedings had been instituted as the result of an illegal arrest, search and seizure and that the evidence obtained should be suppressed and the deportation proceeding dismissed.

The Immigration Judge found the petitioner deportable as charged and rejected his contention that he had been illegally arrested and searched. The Immigration Judge granted the petitioner the privilege of voluntary departure provided that he departed from the United States on or

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* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record filed with the Court.

before November 14, 1973. The Immigration Judge also entered an alternate order of deportation to Guyana in the event the petitioner failed to depart by the specified date.

By Notice of Appeal dated September 17, 1973 the petitioner appealed the order of the Immigration Judge to the Board of Immigration Appeals (the "Board"). By decision dated April 12, 1974 the Board dismissed the appeal and granted the petitioner the privilege of voluntary departure provided that he depart from the United States within 60 days of the date of the Board's order. The Board further ordered that if the petitioner did not depart within the time set for voluntary departure, he would be deported to Guyana as provided in the Immigration Judge's order. The Board held that the petitioner's testimony at the deportation proceeding clearly established his deportability and that such admissions were not obtained as a result of any search and seizure or questioning during the period of his arrest.

This petition for review was filed on June 3, 1974 and the petitioner's deportation was stayed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statute

Immigration and Nationality Act, Section 287 (8 U.S.C. § 1357):

> Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;
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> * * * * *

ARGUMENT

The Arrest Of Petitioner Was Lawful And The Finding Of Deportability Was Not Based On Any Evidence Seized As The Result Of Such Arrest.

A. Petitioner's Arrest Was Lawful

Section 287(a)(2) of the Act, 8 U.S.C. § 1357(a)(2), empowers immigration officers to make an arrest without a warrant in two situations: (1) when an alien in his presence or view is entering or attempting to enter the United States illegally; and (2) when an alien is believed to be in the United States in violation of law and the officer has reason to believe that the alien is likely to escape before an arrest warrant can be obtained.

The petitioner was arrested by immigration officers at a garage where the officers had already arrested another illegal alien. When asked by one of the officers for identification the petitioner told the officer that he had no identification and would consult his attorney (T. 8, p. 4). The officer then asked the petitioner where he was from and the petitioner stated that he was from Guyana (T. 8, p. 4). Since the petitioner had acknowledged that he was an alien and had no evidence of his right to be in the United States, the immigration officer placed petitioner under arrest and took him to the Service office. 8 C.F.R. § 264(e).

Section 287(a)(1) of the Act, 8 U.S.C. § 1357(a)(1), gives an immigration officer the power, without a warrant, to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. Just prior to the petitioner's arrest, the Service officers had apprehended an illegal alien at the petitioner's place of employment. Thus, it was reasonable for them to believe that other employees of the garage might also be illegal aliens.

Furthermore, the petitioner admitted to the officers that he was an alien, that he had no evidence of his right to be in the United States and that he would call his attorney. The officers could thus have reasonably believed petitioner was likely to escape before they could return with a warrant.

Petitioner contends that his warrantless arrest was unlawful under *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). In that case, the Supreme Court held that a warrantless search of an automobile pursuant to Section 287(a)(3) of the Act, made without probable cause or consent, violated the Fourth Amendment.

Petitioner's reliance on the *Almeida-Sanchez* case, and on the other cases which he cites and which deal with warrantless searches of automobiles pursuant to Section 287(a)(3), is clearly misplaced. First, the petitioner's arrest was made pursuant to Section 287(a)(1) and (a)(2) and Section 287(a)(3) has no applicability whatsoever to petitioner's arrest.

Secondly, the Supreme Court in *Almeida-Sanchez* found no probable cause for the warrantless search of an automobile under the facts in that case. In this case, however, there was probable cause to arrest petitioner without a warrant. He had admitted his alienage, and he had no evidence to establish his right to be present in the United States. The combination of these factors was sufficient probable cause for the immigration officers to arrest petitioner without a warrant. Cf., *United States* v. *Mallides*, 473 F.2d 859 (9th Cir. 1973).

It should be noted, moreover, that there is no evidence in the record, nor could petitioner so contend, that the officers acted in violation of petitioner's constitutional rights after petitioner was taken into custody. More specifically,

the petitioner was immediately taken to the Service office in accordance with Section 287(a)(2) of the Act but was not questioned until his attorney was present (T. 8, p. 8). It is submitted, therefore, that the record does not disclose any constitutional deprivation in petitioner's apprehension.

B. The Deportation Order Was Properly Substantiated

Even assuming that the arrest without warrant was illegal, it is well-settled that irregularities in the arresting operation do not necessarily vitiate the deportation order if that order is properly substantiated. *Bilokumsky* v. *Tod*, 263 U.S. 149 (1923); *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F.2d 1180 (8th Cir. 1973); *LaFranca* v. *Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969). If the rule were otherwise, aliens in petitioner's position could permanently immunize themselves from deportation simply by showing that their initial arrest by an immigration officer was illegal. No such absurd result is required by the Act or the Constitution.

The petitioner was found to be deportable as an alien who had been admitted as a nonimmigrant visitor for pleasure until March 1, 1972 and who remained in the United States beyond that date without authority. At the deportation hearing, petitioner conceded the factual allegations in the Order to Show Cause, *i.e.* that he was an alien, that he was admitted to the United States on December 19, 1971 as a nonimmigrant visitor for pleasure authorized to remain until March 1, 1972, and that he remained beyond that date without authority (T. 9, T. 8, p. 1). The only other evidence presented by the Service was petitioner's passport, and that was not taken from the petitioner at the time of his arrest but rather was voluntarily delivered to the Service by petitioner's attorney (T. 8, p. 9). As this Court

stated in *LaFranca* v. *Immigration and Naturalization Service, supra,* at 689:

> "... [petitioner's] deportability was conceded at the hearing. The Immigration Service did not rely upon any statement taken or evidence seized at the time of his arrest. Under these circumstances, even if the arrest without a warrant were illegal this would not invalidate the subsequent deportation proceedings."

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
LYDIA E. MORGAN,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
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CA 74-1753

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 15th day of November 1974 she served 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Oltarsh, Flattery & Oltarsh, Esqs.,
225 Broadway
New York, NY 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this
15th day of November 1974

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975

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